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August 2, 2019

Sent via email/eFile

BCUC INDIGENOUS UTILITIES REGULATION INQUIRY
EXHIBIT A-20

Mr. Doug Slater
Director, Regulatory Affairs
FortisBC Group of Companies
16705 Fraser Highway
Surrey, BC V4N 0E8
gas.regulatory.affairs@fortisbc.com

Re: British Columbia Utilities Commission – Indigenous Utilities Regulation Inquiry – Project No. 1598998 - BCUC Information Request No. 1

Dear Mr. Slater:

Further to British Columbia Utilities Commission Order G-110-19, enclosed please find BCUC Information Request No. 1 to FortisBC Group of Companies. In accordance with the Regulatory Timetable, please file your responses no later than Tuesday, September 10, 2019.

Sincerely,

Original Signed By:

Patrick Wruck
Commission Secretary

/nd

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British Columbia Utilities Commission
Indigenous Utilities Regulation Inquiry

INFORMATION REQUEST NO. 1 TO FORTISBC GROUP OF COMPANIES

1.0 Reference: Exhibit C4-2, Section 2.3, p. 4
Existing co-ownership and operation of an "Indigenous utility" - MHLP

In Exhibit C4-2, the FortisBC Group of Companies (FortisBC) summarizes the Mt. Hayes Limited Partnership (MHLP) liquefied natural gas (LNG) facility. FortisBC states:

> The example of MHLP, which for all intents and purposes functions like a component of BC's largest natural gas utility (FEI), underscores how important it is for the BCUC to remain cognizant of the purpose of utility regulation when determining the form of regulation for an 'indigenous utility' – just as it would for a non-'indigenous utility.'

1.1 Please discuss, in FortisBC's view, whether different considerations for the form of regulation would be required if an entity such as MHLP were:

a) Majority owned by Indigenous Nation(s)[1]; and/or
b) Not functioning like a component of FortisBC Energy Inc. (FEI).

2.0 Reference: Exhibit C4-2, Section 3, 4, pp. 7–8
Definition of "Indigenous utility" and appropriate regulatory models

On pages 7 to 8 of Exhibit C4-2, FortisBC states:

> Rather than developing a regulatory scheme tied to the definition of 'indigenous utility' in the Terms of Reference, the BCUC [British Columbia Utilities Commission] should focus on the presence or absence of the underlying policy rationale for public utility regulation.
>
> …In general, an 'indigenous utility' should be regulated similarly to an equivalent non-'indigenous utility', with the nature of regulation (i.e., full or some form of light-handed regulation) dependent on what is required to achieve the purpose of regulation.

2.1 Based on the preamble, does FortisBC consider that the recommendations of this Inquiry, with respect to the nature of regulation, should apply equally to all utilities, regardless of Indigenous or non-Indigenous ownership? Please explain FortisBC's position.

3.0 Reference: Exhibit C4-2, Section 4.1, pp. 8–9; Exhibit C14-2, p. 7
Constitutional considerations

Prepared by its legal counsel, FortisBC provides an analysis in Exhibit C4-2 of constitutional considerations with respect to the applicability of the *Utilities Commission Act* (UCA) on Reserve lands.

[1] As defined in section 1 of Order in Council No. 108, http://www.bclaws.ca/civix/document/id/oic/oic_cur/0108_2019.

On page 9, FortisBC states:

> …provincial laws that regulate the *use* of Reserve lands (i.e., laws concerning, for example, the manner of landholding or disposition of land-based interests) are likely inapplicable. Section 88 of the *Indian Act* does not explicitly refer to 'lands reserved for the Indians' and has to date been interpreted not to apply to laws regulating land. Provincial laws with this character therefore remain inapplicable on Reserve lands.
>
> …[T]he regulation of *activities* on Reserve lands (as opposed to the *use* of land) through a provincial law of general application such as the UCA likely only incidentally interferes with section 91(24) [of the *Constitution Act, 1867*]. Therefore, the UCA and the jurisdiction of the BCUC extends [sic] to the regulation of compensable utility services provided on Reserve lands.

3.1 Please discuss whether the analysis prepared by FortisBC's legal counsel reviewed the jurisdiction of the BCUC on Treaty lands or Indigenous Nations with self-government agreements.

3.1.1 As applicable, please provide FortisBC's view on the applicability of the UCA and the jurisdiction of the BCUC in such instances.

3.2 Please explain further why FortisBC considers utility services to be an *activity* on lands rather than a *use* of lands.

On page 7 of Exhibit C14-2, the Adams Lake Indian Band (Adams Lake) states:

> The *Indian Act* provides authority for First Nations to make decisions respecting their land:
>
> > **81(1)** The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely…
> >
> > (f) the construction and maintenance of watercourses, roads, bridges, ditches, fences and other local works….
>
> To interpret the wording of the statute in its grammatical and ordinary sense, 'local works' must include Indigenous utilities.

3.3 Please discuss if the analysis undertaken by FortisBC's legal counsel included section 81(1) of the *Indian Act*, with respect to its potential applicability in the context of utilities.

3.3.1 If FortisBC has a view, please comment on the submission of Adams Lake with respect to the applicability of the term "local works" to utilities.

4.0 Reference: Exhibit C4-2, Section 4.3, 4.4.2, 4.4.3, pp. 10–11, 12, 16; Exhibit C13-2, p. 12
Groupings for Indigenous Utility Regulation

On pages 10 to 11 of Exhibit C4-2, FortisBC summarizes five groupings for Indigenous utility regulation in a table. Grouping "2" is described as: "Public utility with <u>controlling</u> interest owned by an 'indigenous nation', serving only Indigenous peoples who have a say in the governance of the 'indigenous nation.'"

With respect to this grouping, FortisBC's position is that regulation should be addressed by a section 88(3) exemption from Part 3 of the UCA.

4.1 Based on the FortisBC Indigenous utility regulation grouping framework, please discuss FortisBC's view on whether this framework should apply in the same manner in areas where there is no or limited existing services.

4.2 Please explain how FortisBC defines a controlling interest in terms of percentage ownership or other.

4.2.1 Please discuss if FortisBC has a position on whether a "controlling interest" could be held by: a single Indigenous Nation; a corporation wholly owned by an Indigenous Nation; multiple Indigenous Nations; or a combination thereof.

4.3 Please explain whether FortisBC's position is that each Indigenous utility would have to apply to the BCUC for a section 88(3) exemption, or that there should be a class exemption based on the description of this grouping, or otherwise.

4.3.1 Please explain, in FortisBC's view, whether such an exemption would cease to apply if an Indigenous utility were to serve customers that were not members of the Indigenous Nation(s).

4.3.1.1 Please discuss if FortisBC has a view on what provisions may be required to transition an Indigenous utility from exempt to non-exempt status.

On page 12, FortisBC states:

> The definition of 'public utility' in the UCA excludes 'a municipality or regional district in respect of services provided by the municipality or regional district within its own boundaries…'. The logic behind this exclusion is that these bodies have in place governance structures that allow all ratepayers to hold the municipality accountable. Residents of a municipality can exercise the right to vote if they object to how service is provided. The qualifier 'within its own boundaries' ensures that all recipients of the service can avail themselves of that right to vote.

On page 16, FortisBC states:

> Group 3 'indigenous utilities' are public utilities with a controlling interest owned by an 'indigenous nation', serving one or more customers who do not have a say in the governance of the 'indigenous nation'. This is the situation that the BCUC considered in the Spirit Bay proceeding, discussed above. These 'indigenous utilities' should be regulated because the rationale for an exclusion akin to municipalities is absent. Some customers (i.e., non indigenous customers or corporations) would have no meaningful recourse in the event of inadequate service or excessive rates.

On page 15 of Exhibit C13-2, the Nuu-chah-nulth Tribal Council, Cowichan Tribes, Gitanyow First Nation, Homalco First Nation and B.C. First Nations Clean Energy Working Group (Collective First Nations) state:

> It is not clear why an entitlement to vote results in municipal councils being: '… accountable to ratepayers for the performance, including rates, of the municipal utility.' Commercial and industrial ratepayers of municipal utilities don't have a right to vote. Their entitlement to receive fair rates and safe, reliable service is protected by the common law and not a right to vote.

4.4 Please discuss whether FortisBC has a view on the Collective First Nations' position that some ratepayers of municipal utilities do not have a right to vote.

4.5 Does FortisBC consider that an Indigenous utility may be able to develop other recourse mechanisms for: non-Indigenous customers; Indigenous customers without voting rights; or corporations?

4.5.1 Does FortisBC consider that if other recourse mechanisms could be demonstrated, that this would be a consideration in whether a section 88(3) exemption was warranted?

5.0 Reference: Exhibit C4-2, Section 4.3, 4.5, p. 11, 17–18
Indigenous Utility Regulation and small utilities

On page 11 of Exhibit C4-2, FortisBC states with respect to "grouping 3" (a public utility with controlling interest owned by an Indigenous Nation; serving one or more customers who don't have a say in the governance of the Indigenous Nation): "The nature of regulation (i.e. whether light-handed or not) should depend on the extent of consumer vulnerability and proportionality of regulatory burden."

On pages 17 to 18, FortisBC describes the spectrum of regulation of public utilities, referencing the Alternative Energy Solutions (AES) Inquiry Report.

5.1 In FortisBC's view, please clarify whether small Indigenous utilities should be subject to the same considerations as small non-Indigenous utilities, in determining the nature of regulation.

5.1.1 If FortisBC considers there are different considerations for Indigenous utilities, please explain.

5.2 Please discuss if FortisBC considers that BCUC guidelines for scaled regulation for Indigenous utilities would be appropriate or beneficial.

5.3 In FortisBC's view, please discuss if there would be any concerns with small utilities (Indigenous or otherwise) being subject to a different degree of regulation than the "full" regulation applied to FEI and FortisBC Inc.

6.0 Reference: Exhibit C4-2, Section 4.7, pp. 18–19
Additional considerations relevant to the regulatory framework

FortisBC states in Exhibit C4-2:

> Some presenters in the BCUC's town hall meetings have expressed support for the creation of a new regulator for 'indigenous utilities'. FortisBC believes that energy consumers in British Columbia, whether Indigenous or non-Indigenous, are best served by the BCUC continuing to regulate all public utilities in British Columbia. This would be irrespective of whether or not those utilities are 'indigenous utilities'. The BCUC has considerable expertise with public utilities. There are advantages to having consistent application of decisions, based on established regulatory principles and policy.

6.1 If a regulator for Indigenous utilities were to be created, please provide hypothetical examples of how inconsistent application of decisions could disadvantage public utilities regulated under the UCA and/or Indigenous utilities subject to an Indigenous utility regulator.